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Do Churches Matter - Towards an Institutional Understanding of the Religion Clauses

Richard W. Garnett

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DO CHURCHES MATTER? TOWARDS AN INSTITUTIONAL UNDERSTANDING OF THE RELIGION CLAUSES

RICHARD W. GARNETT*

IN recent years, several prominent scholars have called attention to the importance of the "various 'First Amendment institutions'" that "play a significant role in contributing to public discourse[.]"[1] There is a growing body of work informed by an appreciation for what Professor Balkin calls the "infrastructure of free expression."[2] The freedom of expression, he suggests, requires "more than mere absence of government censorship or prohibition to thrive; [it] also require[s] institutions, practices and tech-

* John Cardinal O'Hara, C.S.C. Associate Professor of Law, University of Notre Dame. An earlier version of this essay was presented on March 21, 2007, at the Villanova University School of Law, as the annual Gianella Lecture. I am deeply grateful to Dean Mark Sargent for the honor of delivering this lecture and for his leadership in the important project of engaged, distinctively Catholic legal education and scholarship. I appreciate also the thoughtful, helpful questions and comments I received about my lecture from Villanova students and faculty, including Michael Moreland, Robert Miller, Kathy Brady and Patrick Brennan. Nicole Stelle Garnett, Paolo Carozza, Bob Rodes, John Coughlin, Paul Horwitz, Eduardo Penalver, Kyle Duncan, Steve Shiffrin, Steve Smith, A.J. Bellia and Nelson Tebbe were also generous with their time and suggestions for the essay.

1. *See* Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1497 (2007) (noting importance of First Amendment institutions).

2. *See* Jack M. Balkin, Address at the Second Access to Knowledge Conference at Yale University: Two Ideas for Access to Knowledge: The Infrastructure of Free Expression and Margins of Appreciation (Apr. 27, 2007) (transcript available at http://balkin.blogspot.com/2007/04/two-ideas-for-access-to-knowledge.html) (noting that freedom of speech rests on infrastructure of free expression). Prof. Balkin observed:

> What is in that infrastructure? It includes government policies that promote the creation and delivery of information and knowledge. It concerns government policies that promote transparency and sharing of government created knowledge and data. It involves government and private sector investments in information provision and technology, including telephones, telegraphs, libraries, and Internet access. It includes policies like subsidies for postal delivery, education, and even the building of schools.

Id.

nological structures that foster and promote [it]."[3] The intuition animating this scholarship, then, is that the freedom of expression is not only enjoyed by and through, but also depends on the existence and flourishing of, certain institutions—newspapers, political parties, interest groups, libraries, expressive associations, universities and so on. These "First Amendment institutions" are free-speech actors, but they also play a structural—or, again, an "infrastructural"— role in clearing out and protecting the civil-society space within which the freedom of speech can be well exercised. These institutions are "not only conduits for expression," they are also "the scaffolding around which civil society is constructed, in which personal freedoms are exercised, in which loyalties are formed and transmitted, and in which individuals flourish."[4]

Similar "infrastructural" claims can and should be proposed with respect to the freedom of religion. Like the freedom of speech, religious freedom has and requires an infrastructure. Like free expression, it is not exercised only by individuals; like free expression, its exercise requires more than an individual with something to say; like free expression, it involves more than protecting a solitary conscience. The freedom of religion is not only lived and experienced through institutions, it is also protected and nourished by them. Accordingly, the theories and doctrines we use to understand, apply and enforce the First Amendment's religious-freedom provisions should reflect and respect this fact. If we want to understand well the content and implications of our constitutional commitment to religious liberty, we need to ask, as Professors Lupu and Tuttle have put it, whether "religious entities occupy a distinctive place in our constitutional order[.]"[5]

I.

We lawyers live in a made-up world. This is not to say that lawyers are demiurges, deities or delusional. It is only to observe that lawyers deal primarily with things and tools that lawyers and "the law" create. Our made-up world is *our* made-up world; it is both inhabited and constructed *by us*. "[A] lawyer," Professor Finnis has written, "sees the desired future social order from a professionally structured viewpoint, as a stylized and manageable drama."[6] Appreciating this fact should push us to ask how well we have made it, what we have made it for and what its relationship is to the world inhabited by regular people.

Think about it: Regular people experience car accidents in which they are injured, and which cause them pain and cost them money. Law-

3. Posting of Jack M. Balkin to Balkinization, http://balkin.blogspot.com/2007/05/infrastructure-of-religious-freedom.html (Apr. 30, 2007, 8:59 EST).

4. Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1854 (2001).

5. Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 92 (2002).

6. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 282-83 (1980).

yers, on the other hand, inhabit a world of "torts," an element of which is often "negligence," which may give rise to "liability" for "damages." Regular people chuckle—they probably think of Ferris Bueller, not Felix Frankfurter[7]—when they read about blockbuster free-speech cases involving high-school smart-alecks who get on television, and torment their principal, by waving "Bong Hits 4 Jesus" signs at an Olympic Torch parade.[8] For lawyers, though, the relevant players in stories like this are terms and concepts like "state actors," "viewpoint neutrality" and "*Tinker* balancing." Regular people do not encounter or experience "*mens rea*"; they do not pass their afternoons in a "designated public forum"; and they have never met—unless they ride the Clapham Omnibus[9]—the "reasonable man." The lawyer's world, however, is thick with these and similar places, persons and things; they are our raw materials, our stock-in-trade. A medical doctor works with bodies, a farmer with dirt, seeds and weather. They deal with things that are given, not made, and that are independent of and prior to the work of doctors and farmers. A lawyer, though, reaches such real things only indirectly, through categories, abstractions and doctrines. For us, as Clifford Geertz once put it, law is "part of a distinctive manner of imagining the real."[10]

This was, I take it, one of Holmes's points in *The Path of the Law.* He wrote:

> There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant.[11]

The country jurist's mistake, Holmes thought, was not so much that he had misperceived an object in the real world.[12] He did not mistake, say, a cow for a churn. It was, instead, that he had forgotten to do what law

7. Justice Frankfurter's understanding of the mission, nature and accomplishments of public education can, it seems safe to say, be contrasted with those promoted in the film classic, FERRIS BUELLER'S DAY OFF (Paramount Pictures 1986). *See, e.g.*, Illinois *ex rel.* McCollum v. Bd. of Educ. of Sch. Dist. No. 71, 333 U.S. 203, 212-32 (1948) (Frankfurter, J., concurring).

8. *See* Morse v. Frederick, 127 S. Ct. 2618 (2007) (describing First Amendment case regarding display of "BONG HiTS 4 JESUS" banner at school function). For an extended discussion of *Morse*, see, for example, Richard W. Garnett, *Can There Really Be "Free Speech" in Public Schools?*, 12 LEWIS & CLARK L. REV. 45 (2008).

9. *See, e.g.*, McQuire v. W. Morning News Co., (1903) 2 K.B. 100, 109 (describing "ordinary reasonable man" as "the man on the Clapham omnibus").

10. Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective, in* GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 170 (1983).

11. Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 1006 (1997).

12. *See id.* (discussing problematic nature of jurist's limited analysis of case law).

students are told and trained to do, namely, to "think like a lawyer," to think not about cows and churns but about rights and remedies, claims and doctrines.[13]

Now, Holmes thought—and we can agree—that the legal enterprise is better able to do what we want it to do, and what it is for, when it employs and addresses legal categories, and the distinctions between and among them, rather than the unformed stuff of real-world, everyday, pre-legal life.[14] If Lon Fuller was right, and "law" involves subjecting human conduct to the governance of general rules for the purpose of achieving and maintaining social order,[15] then it seems reasonable to think that this project will be helped by constructs and classifications that sort, organize and in many cases ignore the real world's messy particulars.

But what if lawyers' categories are somehow "off"? What if the law remakes, for its own purposes, the world in a way that does not accurately convert our pre-legal experience and environment into lawyer-ready tools and abstractions? What if, instead, it distorts that experience? What if it passes over or leaves out something that matters? What if something important and valuable is lost in translation? True, lawyers' abstractions are not actually in or presented by the real world. (We lawyers need not be Platonists.) Still, we want them to at least point in the real world's general direction. Similarly, and more specifically, when it comes to our Constitution, we should want our doctrines, on the one hand, to implement the text in a way that is faithful to its meaning—that is, to its binding content[16]—and, on the other, to capture no less faithfully what is significant, and what really matters, about the real world that the text governs and to which it speaks.

II.

About a decade ago, one of the legal academy's most distinguished scholars suggested that the rules and categories used to enforce the First

13. *See* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 110 (1998) (noting "the preference for generality" that is "part of the legal craft" and one feature of "think[ing] like a lawyer").

14. *See id.* at 108. Schauer observed that Holmes believed that

> law did, and should, divide the world into legal categories like contract, negligence, estoppel, strict liability, equity, and possession, and not into pre-legal or extra-legal categories like railroads, telegraphs, churns, and Cleveland. Only by identifying the proper legal category, Holmes appears to have thought, could the purposes of law be achieved and legal outcomes correctly predicted.

Id.

15. *See* LON L. FULLER, THE MORALITY OF LAW 5-6 (1964) (discussing general history of legal principles in society).

16. For (just) one discussion of constitutional "legitimacy," of the Constitution's meaning, and of why the Constitution's meaning binds, see generally, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

Amendment's Free Speech Clause were failing to meet our expectations.[17] While not quibbling with the "prescriptive merits of designing law around juridical categories," Professor Schauer raised the possibility that the legal tools being used to protect the freedom of speech and implement the First Amendment were missing something important about the real world of speech and speakers.[18] He observed that free-speech law—understandably, and appropriately—reflects our desire to prevent would-be speech regulators from singling out unpopular people and arguments for unfavorable treatment.[19] Because we worry about the temptation to censor that to which we object, we discipline ourselves, like Odysseus lashing himself to the mast,[20] and "ignor[e] what might otherwise appear to be politically and morally relevant features of speakers and speeches[.]"[21]

In particular, Professor Schauer claimed, we tend to ignore institutions.[22] Free-speech law, he contended, "has been persistently reluctant to develop its principles in an institution-specific manner, and thus to take account of the cultural, political and economic differences among the differentiated institutions that together comprise a society."[23] By and large (and understandably, given the relevant text), we focus on "speech"—on its content, purpose and viewpoint—and not on its institutional context, origin or effects. In the real, pre-legal world, however, "speech" happens in, through and by institutions. These institutions vary, and their differences matter. To ignore these institutions and differences may well spare us the ridicule that Holmes heaped on the Vermont judge in the case of the churn, but it still risks distorting both the world that the First Amend-

17. *See* Schauer, *supra* note 13, at 118 (offering criticism of First Amendment).

18. *See id.* (suggesting potential alternative approaches to First Amendment doctrine).

19. *See id.* (analyzing First Amendment doctrine); *see also* Cohen v. California, 403 U.S. 15, 26 (1971) ("[G]overnments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) ("[C]onstitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" (quoting NAACP v. Button, 371 U.S. 415, 445 (1963))).

20. *See generally* JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (1984); Richard W. Garnett, *Why Informed Consent? Human Experimentation and the Ethics of Autonomy*, 36 CATH. LAW. 455, 499 (1996) (discussing "self-paternalism," Odysseus and the Sirens, and constitutionalism).

21. Schauer, *supra* note 13, at 85; *see also* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 283 (1980).

> In this drama, many characters, situations, and actions known to common sense, sociology, and ethics are missing, while many other characters and relationships known only or originally only to the lawyer are introduced. . . . The existence of the legal rendering of the social order makes a new train of practical reasoning possible, and necessary, for the law-abiding private citizen[.]

Id. at 283.

22. *See* Schauer, *supra* note 13, at 84 (explaining "American free speech doctrine has never been comfortable distinguishing among institutions").

23. *Id.* at 84.

ment is supposed to govern and the values which that governing is supposed to reflect and respect.

What should we make of Professor Schauer's diagnosis? Start with the basics: Our Constitution does not permit governments to "abridge" the "freedom of speech."[24] What does this command *mean*? How do we operationalize that meaning in the real world and enforce it in actual cases? What is going to count as "abridg[ing]," or as "speech"? Is the "freedom of speech" the same thing as "the desire to talk," "the ability to utter," or the "compulsion to express oneself"? Does it include the right to receive information,[25] the right to refuse to speak,[26] or the right to associate expressively with others?[27] Is it better thought of in terms of a negative constraint on government regulation or as a positive charge to government?[28] To answer these and so many other questions, and to put the Free Speech Clause's guarantee to work, we need doctrines and rules, categories and abstractions, boundaries and definitions.

So, how and with what should we construct our free-speech tools? There are some categories and distinctions that we could but do not draw, because they seem inconsistent with the values that animate the text we are trying to implement. For example, we could, but do not, distinguish in free-speech cases and doctrine between "speech by women" and "speech by men," or between "speech by liberals" and "speech by conservatives."[29] Such categories would be unhelpful constitutional tools, because their use would be inconsistent with the assigned constitutional tasks and their premises would be at odds with the relevant constitutional values. Nor have we bothered drawing lines, for case-deciding purposes, between

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24. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech[.]"); U.S. CONST. amend. XIV. The First Amendment does not regulate or constrain directly the decisions or conduct of non-state actors. *See, e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) ("Our cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not.").

25. *See* Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas.").

26. *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 492 (1995) ("The First Amendment generally protects the right not to speak as well as the right to speak.").

27. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

28. *Compare, e.g.*, Lilian R. Bevier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 81 (1992) (suggesting applicable Supreme Court precedent aims to reduce "public forum regulators [from] abus[ing] their governmental power"), *with, e.g.*, OWEN M. FISS, THE IRONY OF FREE SPEECH 3-4 (1996) (discussing instances where government is under positive charge to regulate speech).

29. *Cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992) ("We cannot think of any First Amendment interest that would stand in the way of a State's prohibiting only those obscene motion pictures with blue-eyed actresses.").

"speech on Wednesdays" and "speech on Tuesdays," or between "speech in Times New Roman" and "speech in Courier." Lines like these are easy to employ, but they miss the point and do not move the ball. They make significant what is not; what they capture does not matter.

So, what free-speech categories have we drawn? A few examples: We have, for starters, categorized carefully the public property where private speech takes place.[30] As a rule, the government is going to have more room to regulate what goes on in public—that is, publicly owned—places than to regulate what people say and do in private.[31] The First Amendment, however, complicates things. In order to vindicate the "freedom of speech," and to put the Free Speech Clause to work, we have distinguished the "traditional public forum" from the "designated public forum" and the "non-public forum."[32] When resolving disputes involving the regulation of private expression on public property, or private speakers' access to public spaces, we place the space and property in the appropriate box. We hope we do so in a way that is consistent with the value judgments and other considerations that led to the creation of the categories in the first place. Then, we apply the category-appropriate rules that constrain the government's ability to act with respect to speech in the kind or category of space at issue. In other words, we first categorize the spaces and then proceed to one balancing test or another to evaluate the regulation.

Another example: We distinguish protected "speech" from categories of expression that we think the First Amendment need not reach and that the "freedom of speech" need not include.[33] Some speech, in the land of constitutional lawyers, isn't really, or at least is not regarded and protected as, "speech."[34] We have identified a number of categories of such non-

30. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992); Lee v. Int'l Soc'y for Krishna Consciousness, Inc., 505 U.S. 830, 831 (1992) (considering application of First Amendment in designated public forums). *See generally*, Richard W. Garnett, *Less Is More: Justice Rehnquist, the Freedom of Speech, and Democracy, in* THE REHNQUIST LEGACY 26 (Craig M. Braley ed., 2006); Bevier, *supra* note 28.

31. *See, e.g.*, ISKCON v. Lee, 505 U.S. at 678 (explaining "it is . . . well settled that the government need not permit all forms of speech on property that it owns and controls").

32. *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 203 (2003) (discussing potential First Amendment concerns at stake in regulation of internet access in public libraries); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001) (discussing potential First Amendment concerns at stake in regulation of use of school district facilities); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995); Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 830 (1985) (discussing potential First Amendment concerns at stake in university's discretion to prohibit religious groups' access to university facilities).

33. *See generally* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 273 (1981) ("When we define the word 'speech,' we are categorizing."); Frederick Schauer, *Codifying the First Amendment:* New York v. Ferber, 1982 SUP. CT. REV. 285 (1982); William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107 (1982).

34. *See, e.g.*, Roth v. United States, 354 U.S. 476, 481-83 (1957) (determining obscenity to fall outside scope of protected First Amendment interests); Chaplin-

speech "speech"—"defamation," "threats," and "incitement," for example—and defined their boundaries in a way that is, we hope, consistent with the First Amendment's meaning and with the commitments that caused us to decide that the category being defined need not be considered "speech."[35]

An intuition underlying this categorization is something like "less is more" (or, maybe, "more is less");[36] that is, courts understand that the extent to which the Constitution can meaningfully protect "the freedom of speech" increases as the reach, or content, of the protected activity decreases.[37] "[T]he more that 'free speech' purports to mean," in other words, "the less meaningful the protections that free-speech rights can provide. The more work we ask the freedom of speech to do, the less energetically and successfully it will be able to do it."[38] The crucial question, though, is whether the categories upon which we settle for the purpose of confining "speech" to a manageable, protectable activity capture what it is we are trying to protect; it is, again, whether our law-world categories accurately capture and translate the significance and value of the real-world activity.[39]

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sky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (determining action of insulting police officer to fall outside scope of protected First Amendment interests).

35. *See, e.g.*, Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)*, 92 COLUM. L. REV. 1, 18 (1992) (noting that "[o]bscenity does not count as speech"); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 615 n.146 (1986) (noting that modern Court classifies obscenity as "not being speech at all"). *But see* R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) ("Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity 'as not being speech at all[.]'").

36. *See* Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835, 837 (2004) (asking "general question . . . whether the definition of any right can be expanded without risking access to the right"); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 654-55 n.140 (1980) (noting "danger" of an excessively expansive understanding of the First Amendment's reach).

37. Something like this observation seems to have animated Robert Bork's controversial contention that "[c]onstitutional protection should be accorded only to speech that is explicitly political." Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971). After all, he argued, "[g]overnment cannot function if anyone can say anything anywhere at any time." *Id.* at 21.

38. Garnett, *supra* note 30.

39. In a related vein, Professor Robert Post has argued that the "internal incoherence" of the Court's free-speech doctrine is due, at least in part, to the fact that it has "imagined that the purpose of First Amendment jurisprudence is to protect speech as such." Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1250 (1995). Post contends, though, that "the constitutional values advanced to justify this protection inhere not in speech as such, but rather in particular social practices." *Id.* And, he continues, "First Amendment doctrine will continue to flounder until it focuses clearly on the nature and constitutional significance of such practices." *Id.* at 1250-51. Post's suggestion that the categories employed in the free-speech context would better implement First Amendment values, and the freedom of speech, well understood, if they were to focus less on "speech as such" and more on "particular social practices" is, I think, consonant

Many examples could be presented and discussed but, for present purposes, no more are needed. Professor Schauer's point is that we have—not entirely, certainly, but for the most part—avoided putting the Free Speech Clause to work using doctrine that takes into account the institutional character of the regulating agency, or the institutional context or site for the speech, or the institutional character or status of the speaker, or the importance of the speech at issue to the role an institution plays in the structure of civil society.

Now, in many cases, we would not want the law to take institutional variation into account. "True threats," for example, are not protected by the First Amendment,[40] and we probably do not think that "threats" issued by newspapers, or political parties, or universities, or librarians should be exempted from this rule. For the most part, the government's ability to regulate speech does not depend on who (or what) the speaker is and, again, there are good reasons for this. We worry that governments will prefer popular speech and speakers over unpopular ones and soothing messages over abrasive ones.

And so, we craft our categories and draw our distinctions in ways that, we hope, neither tempt nor enable governments to silence the marginal, the provocative or the revolutionary. Categories and classifications that were institution-focused, we think, could open the door to favoritism and special privilege.[41] In order to keep this door closed, we say that if the advertisements of a candidate for president enjoy protection, then so do those of a liquor store.[42] If a citizen can be compelled to offer testimony, then—so far as the Constitution goes, anyway[43]—so may a newspaper re-

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with the suggestions advanced in this Essay regarding the freedom of religion. I am grateful to Prof. Shiffrin for calling my attention to Post's argument.

40. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 359 (2003) (stating "the First Amendment . . . permits a State to ban a 'true threat'").

41. *See* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1267-68 (2005). The author stated:

> Perhaps because so many prominent First Amendment litigants have been bad people with dangerous things to say, and perhaps because so many others have at the very least existed on the fringes of social respectability, there has always been a worry that an ad hoc First Amendment would be especially vulnerable to excess constriction by judges and juries too concerned with the moral or social undesirability of those who were carrying the First Amendment claim.

Id.

42. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); *cf.* Columbia Broad. Sys. Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 201 (1973) (Brennan, J., dissenting) (complaining that "the favored treatment given 'commercial' speech under the existing [regulatory] scheme [at issue] clearly reverses traditional First Amendment priorities. For it has generally been understood that 'commercial' speech enjoys less First Amendment protection than speech directed at the discussion of controversial issues of public importance.")

43. At the time of this writing, the Free Flow of Information Act of 2007—which would, among other things, create a federal "shield" for reporters—was working its way through Congress. *See* Editorial, *Act on the Shield Law*, WASH. POST, Oct. 28, 2007, at B6.

porter. If an official charged with managing a public park must provide viewpoint-neutral access to speakers, then so must an official charged with administering a public university.[44] And so on.[45]

Of course, readers familiar with the fine points, intricate subtleties and cringe-inducing anomalies of First Amendment doctrine understand that much of what has been said so far is oversimplified. Sometimes, notwithstanding the discussion above, our free-speech law is, in fact, institution-sensitive. Public schools and prisons *can* regulate otherwise-protected speech in ways that city councils and state legislatures cannot.[46] In recent years, the Supreme Court *has*—sometimes without admitting it—decided free-speech cases in ways that reflect sensitivity to the distinctive role of institutions like public television stations,[47] the National Endowment for the Arts,[48] the legal profession[49] and universities.[50] It has acknowledged the contributions that "expressive" associations, such as the Boy Scouts, make to the development of diverse and competing views and to the structure of a civil society in which the freedom of speech can flourish.[51] The Court has suggested that newspapers and media corporations are, at least

44. *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000) ("The case we decide here . . . does not raise the issue of the . . . state-controlled University's right . . . to use its own funds to advance a particular message.").

45. Professor Shiffrin, in correspondence, appropriately reminded me that, in practice, the various paired cases just discussed are not, in fact, treated exactly the same. That is, although it is true that commercial speech is increasingly protected, it is still at least *somewhat* less protected than core political speech. Reporters *are* treated more favorably by courts than are ordinary witnesses, even if this special treatment is not required by the Constitution. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J., concurring) ("[T]he courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."). Still, I believe the examples suggest and illustrate the point, i.e., that our doctrine avoids institution-specific categories, in part out of a desire to avoid showing favoritism to certain speech or speakers.

46. *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 413 (1989) (observing regulations of prisoners' speech are permissible if they are "reasonably related to legitimate penological interests" (quoting Turner v. Safley, 482 U.S. 78, 89 (1987))); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."). *See generally* Scott A. Moss, *Students and Workers and Prisoners—Oh My! A Cautionary Note about Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635 (2007).

47. *See generally* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1997).

48. *See generally* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

49. *See generally* Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001).

50. *See* Grutter v. Bollinger, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."). *See generally* Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000); Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461 (2005).

51. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 647-48 (2000). *See generally* Garnett, *The Story of Henry Adams's Soul*, *supra* note 4.

in some contexts, particularly important to First Amendment values, and therefore may and should be treated particularly.[52]

Nevertheless, Schauer's diagnosis of free-speech law seems on-target. And, it raises the question whether our reluctance to incorporate institutions and institutional differentiation more explicitly into First Amendment doctrine causes us to miss or overlook something important about the pre-legal world. In response to this question, as was noted earlier, a number of scholars have taken up Schauer's invitation to re-think the "institutional agnosticism" that characterizes our Free Speech tools and categories.[53] Professor Paul Horwitz, for example, has suggested that universities are "First Amendment institutions" whose special status and function should be reflected in constitutional doctrine.[54] Professor Roderick Hills has presented an "institutional" theory of rights that emphasizes the structural, power-dividing function of private associations.[55] David Fagundes has taken an "institutional rights" approach to the problem of speech by government entities and actors.[56] And, at a recent conference, convened to explore the "role of institutional context in constitutional law,"[57] Schauer re-affirmed his view that there are "socially important institutional distinctions" that constitutional law "systematically ignores"; he suggested that recognizing and giving doctrinal effect to these distinctions "might well serve important First Amendment values and purposes" and again invited efforts to develop and defend institutional approaches and institution-specific categories.[58] On the other hand, Professor Scott Moss—while acknowledging the critique that First Amendment doctrine is "institutionally oblivious"—has highlighted the dangers

52. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 668 (1990) ("Although the press' unique societal role may not entitle the press to greater protection under the Constitution . . . it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations."); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (emphasizing "function of editors" and noting that "[a] newspaper is more than a passive receptacle or conduit for news, comment, and advertising."); *cf.* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 435 (2002) ("[T]he demise of the press as a legally preferred institution is quite possible and perhaps even probable . . . ."). *See generally* Paul Horwitz, *Or of the [Blog]*, 11 NEXUS 45 (2006); Hon. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975) (discussing, among other things, structural role played by free press in our constitutional democracy).

53. *See* Schauer, *supra* note 13, at 120.

54. *See* Horwitz, *Universities as First Amendment Institutions*, *supra* note 1, at 1502. *See generally* Horwitz, Grutter*'s First Amendment*, *supra* note 50.

55. *See* Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 146 (2003).

56. *See* David Fagundes, *State Actors as First Amendment Speakers*, 100 Nw. U. L. REV. 1637, 1640, 1663 (2006).

57. *See generally* Symposium, *Constitutional "Niches": The Role of Institutional Context in Constitutional Law*, 54 UCLA L. REV. 1497 (2007).

58. Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747, 1750, 1755 (2007).

that accompany "extreme institutional tailoring" in free-speech cases arising in prisons, workplaces and public schools.[59]

We would do well to consider the force and implications of Professor Schauer's diagnosis in the context of religious freedom. That is, it makes sense to explore the possibility of an institution-sensitive approach to the Religion Clauses and, more generally, to our thinking about the church-state "nexus."[60] Others have noted the possibility and promise of such an approach but have not yet pursued it.[61] A lot of work remains to be done. Have courts and commentators, in fact, been "institutionally agnostic" when it comes to religious-freedom doctrine? Have the categories and doctrinal tools we use to frame Religion Clauses disputes and decide Religion Clauses cases missed, or mis-described, the role of institutions and institutional context?

III.

Certainly, these and similar questions cannot and so will not be answered definitively here. Still, perhaps this Essay can make a start. Are there institutions that play a special role in shoring up not only "public discourse" generally,[62] but also, and more specifically, the freedom of religion? Do the relevant precedents, doctrines and theories capture this role? Do they translate the reality of these institutions and their functions into the law's "made-up world"? If they do not, could they? If our Religion Clauses' tools and categories are "institutional[ly] agnostic[ ],"[63] how could this failing be remedied?

But first, it should be acknowledged and appreciated that our Religion Clauses doctrine is not, in fact, entirely "institutionally agnostic." We can quickly note and move past the fact that, as in the free-speech con-

59. *See* Moss, *supra* note 46, at 1635.

60. *See* Richard W. Garnett, *Pluralism, Dialogue, and Freedom: Professor Robert Rodes and the Church-State Nexus*, 22 J.L. & RELIGION 503, 512 (2006-2007) (contending that, when it comes to describing church-state problem, term "nexus" is preferable to image of "wall," because former "suggests a relation, even a symbiosis, between two distinct things—neither a collapse of one into the other nor a rigid segregation of the one from the other.").

61. *See, e.g.*, Hills, *supra* note 55, at 149, 161-63, 183-84, 189-90 (discussing various theories of rights); Horwitz, *Universities*, *supra* note 1, at 1520-22; Schauer, *Institutions*, *supra* note 58, at 1750 (exploring "socially important institutional distinctions" including religion, race and gender). Also, it has been argued powerfully that the First Amendment's no-establishment rule should be thought of as regulating the relations between the institutions of government and those of religion and not as, for example, requiring a secularization of civil society or public life generally. *See, e.g.*, Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955 (1989).

62. *See* Paul Horwitz, *Three Faces of Deference*, NOTRE DAME L. REV. (forthcoming 2008) (noting that "religious institutions," like libraries, universities, etc., are "of special importance to public discourse").

63. *See* Schauer, *Principles*, *supra* note 13, at 120.

text,[64] certain institutional settings like prisons and workplaces are treated and governed differently. Consider, however, the extent to which religious-freedom precedents and constitutional arguments have been shaped by courts' understanding of, and aspirations for, a particular institution, that is, the government-run secondary or elementary school. For decades—even centuries, perhaps[65]—in case after case, brief after brief and opinion column after opinion column, we have seen both the application and the content of the Religion Clauses shaped by the perceived special needs and aims of this institution.[66] Even putting aside the complicated question of the place of anti-Catholicism in the Common School movement,[67] it is clear that many of the Court's landmark church-state cases were shaped by the public-school institutional context.

For example, in *Minersville School District v. Gobitis*[68]—the Court's initial, and later rejected, engagement with the flag-salute problem—the Justices seemed to subordinate the freedom of religion to the need to "secur[e]," through public education, "effective loyalty to the traditional ideals of democracy."[69] Public schools, after all, have—as Professor Feldman puts it—"always been devoted to the inculcation of republican ideals."[70] This devotion is inseparable from the institution's identity, and courts have, in a whole raft of Religion Clauses cases, run the Clauses' commands through the filter of this identity. A few years after *Gobitis,* the Court invalidated a release-time program in Champaign, Illinois. The program allowed public-school children to leave regular classes for a short time each week to receive the religious instruction, if any, their parents desired. In invalidating it, the Court emphasized both the crucial role of public schools in promoting civic unity and the allegedly divisive influence

64. For further discussion of the disparate treatment of organizations in First Amendment context, see *supra* notes 47-52 and accompanying text.

65. *See, e.g.,* Donahoe v. Richards, 38 Me. 379 (1854). The opinion noted:

> Large masses of foreign population are among us, weak in the midst of our strength. Mere citizenship is of no avail, unless they imbibe the liberal spirit of our laws and institutions, unless they become citizens in fact as well as in name. In no other way can the process of assimilation be so readily and thoroughly accomplished as through the medium of the public schools . . . .

Id.

66. *See, e.g.,* James E. Ryan, *The Supreme Court and Public Schools,* 86 VA. L. REV. 1335, 1339 (2000) ("[T]he limitations on government support of religion are more stringent within public schools than outside of them.").

67. *See generally* Richard W. Garnett, *American Conversations with(in) Catholicism,* 102 MICH. L. REV. 1191 (2004) (noting history of Common schools movement); Richard W. Garnett, *The Theology of the Blaine Amendments,* 2 FIRST AMEND. L. REV. 45 (2003) (describing anti-Catholic sentiments in nineteenth and early twentieth century).

68. 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

69. 310 U.S. at 598.

70. NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 151 (2005).

of religion: "The public school," Justice Frankfurter wrote in a concurring opinion, "is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools . . . ."[71]

Institutional characteristics have also been relevant in the Court's cases involving public funding for education in religiously affiliated schools and universities. Most obviously, courts have distinguished the environment and goals of religious primary and secondary schools from those of religiously affiliated colleges and universities.[72] Public funding and assistance was—but no longer is[73]—forbidden for the former institutions, but permitted when directed toward the latter.[74] And, religious symbols and observances that, in a primary or secondary school, might raise concerns about coercion or endorsement are less likely to be seen as constitutionally problematic in the university setting.[75]

True, it could be said that these cases do not reflect *institutional* sensitivity so much as sensitivity to the fact that the perceptions, capacities and needs of children are not the same as those of young adults. This difference is real but, nevertheless, it is better to read these cases as relying on more than observations about child development. In the schools-and-religion cases, it is not just that primary and secondary schools are regarded as places where a certain kind of person—a child—happens to be. More important in these cases are the arguments and assumptions about the

71. McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring). I have discussed, in some detail, the role that religion's "divisiveness" has played in the Court's First Amendment decisions and in the work of some commentators. *See generally* Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006) (discussing interaction of religion and First Amendment jurisprudence).

72. Courts and legal doctrines have also distinguished religiously-affiliated schools that are "pervasively sectarian" from those that are not. *Cf.* Mitchell v. Helms, 530 U.S. 793, 828 (2000) ("[T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive.").

73. *Compare, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (finding tuition assistance program did not violate Establishment Clause), *with, e.g.*, Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (invalidating state law that provided financial assistance to nonpublic elementary and secondary schools).

74. *See, e.g.*, Hunt v. McNair, 413 U.S. 734 (1973) (upholding program involving issuance of bonds that would benefit Baptist college); Tilton v. Richardson, 403 U.S. 672 (1971) (finding Act, authorizing grants to colleges and universities, including church-related schools, did not violate Religion Clauses).

75. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools . . . [and] prayer exercises in public schools carry a particular risk of indirect coercion."); Chaudhuri v. Tennessee, 130 F.3d 232, 233 (6th Cir. 1997) (concluding that First Amendment did not prohibit nonsectarian prayers or moments of silence at public functions at Tennessee State University). *But see* Mellen v. Bunting, 327 F.3d 355, 360 (4th Cir. 2003) (invaliding traditional supper prayer at Virginia Military Institute).

nature and function of the institutions themselves, and about the predicted effect of government funding on the purpose of those institutions.

Another way in which the law dealing with religious freedom is sensitive to the special needs of different institutions is through the so-called "ministerial exception." Religious institutions enjoy what is widely regarded as a license to discriminate. The Civil Rights Act of 1964 allows religious organizations to engage in otherwise unlawful religious discrimination[76] and a judge-made, though apparently constitutionally grounded, rule prevents courts from applying anti-discrimination laws to such organizations' hiring and firing decisions regarding ministers.[77] These exemptions are widely accepted, even if there are disagreements about their shape and application.[78]

But, why? That is, why are churches allowed to engage in what would otherwise be illegal discrimination in their dealings with ministers?[79] If it would be illegal for Wal-Mart to fire a store manager because of her gender, then why should a religiously affiliated university be permitted to fire a chaplain because of hers?[80] Or, to borrow an example discussed by Professors Eisgruber and Sager in their recent and important book,[81] why should anti-discrimination law not reach the refusal—or, more precisely,

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76. *See, e.g.*, Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 329-30 (1987) (exempting religious organizations' secular activities from Title VII prohibition on religious discrimination).

77. *See, e.g.*, Hollins v. Methodist Healthcare, Inc. 474 F.3d 223 (6th Cir. 2007).

> The ministerial exception, a doctrine rooted in the First Amendment's guarantees of religious freedom, precludes subject matter jurisdiction over claims involving the employment relationship between a religious institution and its ministerial employees, based on the institution's constitutional right to be free from judicial interference in the selection of those employees.

Id. at 225.

78. *See, e.g.*, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 62 (2007) ("[M]ost people—including many who lament these discriminatory practices—believe that church policies about clergy should be constitutionally exempt from anti-discrimination statutes."). *But cf.* MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005) (arguing religious institutions should be subject to rule of law); Diana B. Henriques, *Where Faith Abides, Employees Have Few Rights*, N.Y. TIMES, Oct. 9, 2006, at A1.

79. *See, e.g.*, Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169, 1181 (2007) (reviewing MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005)) ("[B]y judicial interpretation, religious organizations may hire and fire their clergy and similar religious leaders on any criteria they choose; courts will not entertain lawsuits alleging discrimination of any kind."). *See generally* Petruska v. Gannon Univ., 462 F.3d 294, 303-05 (3d Cir. 2006) (discussing "ministerial exception").

80. *See Petruska*, 462 F.3d at 307-08 (noting rationale for permitting such discrimination in ministerial setting).

81. EISGRUBER & SAGER, *supra* note 78.

the asserted inability[82]—of the Roman Catholic Church to ordain women as priests? Now, for Eisgruber and Sager, the ministerial exception is not the implication or requirement of the law's special cognizance of religious institutions. For them, churches' liberty to discriminate when selecting ministers does not reflect churches' or religion's special status. Instead, this liberty is rooted in "constitutional values of autonomy and freedom of association that run to the benefit of all members of our constitutional community."[83] Although indicating dissatisfaction with the Court's reasoning in the *Boy Scouts* case,[84] they nevertheless invoke that decision as providing a basis for churches' right to discriminate, a right that they regard as flowing from the not-religion-specific constitutional principle that "there are a variety of personal relationships in which members of our political community are free to choose their partners, associates, or colleagues without interference from the state": "[C]ontemporary constitutional law endorses associational freedom [and] the constitutional immunity of the Catholic church from equal employment opportunity mandates in the choice of priests can readily be explained as an instance of that freedom."[85]

We should ask whether it is enough—that is, whether it captures all that we want to say about the freedom of religious institutions to make decisions about training and ordaining ministers and about the power of governments to oversee and regulate these decisions—to treat the Roman Catholic Church like the Boy Scouts.[86] Several reviewers—while expressing great admiration for their project—have expressed doubts about this aspect of the Eisgruber and Sager approach.[87] I share these doubts.[88] Religious institutions are more than "voluntary association[s] with a cause."[89]

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82. *See generally* Pope John Paul II, *Ordinatio sacerdotalis* (1994), *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_22051994_ordinatio-sacerdotalis_en.html (last visited Jan. 24, 2008).

83. EISGRUBER & SAGER, *supra* note 78, at 63.

84. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

85. EISGRUBER & SAGER, *supra* note 78, at 65.

86. *Cf.* Lupu & Tuttle, *Religious Entities*, *supra* note 5, at 50 (noting that "[t]he task of any overarching theory of the constitutional status of religious entities is to identify and elaborate the reasons, if any, that justify treatment of religious enterprises different from secular organizations and from individual believers").

87. *See, e.g.*, Thomas C. Berg, *Can Religious Liberty Be Protected As Equality?*, 85 TEX. L. REV. 1185, 1204-11 (2007) (reviewing CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007)); Ira C. Lupu & Robert W. Tuttle, *The Limits of Equal Liberty as a Theory of Religious Freedom*, 85 TEX. L. REV. 1247, 1267-72 (2007) (reviewing CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007)).

88. Richard W. Garnett, *Free to Believe*, FIRST THINGS, May 2007, at 39, 43.

89. George Weigel, *Papacy and Power*, FIRST THINGS, Feb. 2001, at 18, 25; *see also* Russell Hittinger, *Dignitatis Humanae, Religious Liberty, and Ecclesiastical Self-Government*, 68 GEO. WASH. L. REV. 1035, 1053 (2000) ("What was most important [for the Church in the modern world] was that the Church could be differentiated without reducing itself to the status of other private associations.").

Other examples could be offered of ways in which the doctrine used to implement the Religion Clauses and the theory used to understand them are, if not entirely sensitive, then at least not quite "agnostic" institutionally. The question is not so much whether or not the doctrine *ever* takes account of institutional distinctions as whether or not it does so in the right way, to the right extent, and for the right reasons.

IV.

An appropriately institutional approach to the Religion Clauses could have a number of different dimensions. We might ask, for example, whether our legal doctrine relating to religious freedom under law should vary with the institutional character of the government entity whose actions are at issue. "The government," after all, acts through many agents and parts that are charged with many different tasks, vested with varying degrees of discretion and constrained in different ways through different means. Is it realistic—that is, does it capture and translate reality—to treat all these parts' and agents' acts as the same thing, that is, "state action"?

It is nothing new or controversial, of course, to note that the Religion Clauses, as originally ratified, did not speak to state and local governments, but only to "Congress."[90] It was "Congress" that could not violate the "free exercise" of "religion" or make a law respecting its "establishment." Today, though, it is "constitutional bedrock" that the Religion Clauses constrain the actions of all three branches of the national government—not just Congress—and of all state and local government officials.[91] Furthermore, these provisions have, it appears, the same binding content[92] whether the government actor in question works for a city, town, village, country, state, executive agency, legislature or federal court. Should they?

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90. *See, e.g.*, Barron v. City of Baltimore, 32 U.S. 243 (1833); *see also* Akhil Reed Amar, *Some Notes on the Establishment Clause*, 2 ROGER WILLIAMS U. L. REV. 1, 3 (1996) ("The key point is not simply that, as with the rest of the First Amendment, the Establishment Clause limits only Congress and not the states. That point is obvious on the face of the Amendment and is confirmed by its legislative history.").

91. *See* Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663, 666 (2001).

92. *Cf.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 51 (2004) (Thomas, J., concurring) ("I would welcome the opportunity to consider more fully the difficult questions whether and how the Establishment Clause applies against the States."); Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) (discussing "difficult question" of "[w]hether and how [the Establishment] Clause should constrain state action under the Fourteenth Amendment" and suggesting that "in the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar actions by the Federal Government.").

The point here is not to wade into the "incorporation" debate.[93] It is, instead, to ask whether, even if we assume that the Religion Clauses regulate all government action, they might nevertheless do so in different ways, or to a different extent, depending on the institutional character of the official actor or entity involved. Professor Schragger has observed:

> [although m]uch of the Supreme Court's modern Religion Clause doctrine has been forged in conflicts that directly implicate the traditional powers of local governments[ ] . . . [,] [c]onstitutional theorists have rarely treated this jurisdictional fact as significant because the post-incorporation Court has never made a distinction among levels of government when considering Establishment or Free Exercise Clause challenges.[94]

Perhaps, however, such a distinction should be drawn—and could be drawn, without undermining fundamental commitments—because it would better capture an important feature of the pre-doctrinal reality that the Constitution's doctrines should reflect.

Additionally, a less institutionally agnostic understanding of the Religion Clauses could take account not only of the institutional context of the government actor, but also of the institutional context of the government action. That is, an institutional approach might ask the "where?" question, as well as the "who?" question, differently.[95] Does the Free Exercise Clause require an exemption for religiously motivated conduct from a generally applicable law? This is the paradigmatic Free Exercise Clause problem.[96] Should its solution depend not only on the "general applicability" of the law, or on the existence of a "burden" on an individual's

93. It appears to be settled law that the Establishment Clause has been incorporated against the states, notwithstanding the fact that the Establishment Clause would seem particularly unsuited for incorporation. *See, e.g.*, Amar, *Some Notes*, *supra* note 90, at 3 ("[T]he nature of the states' establishment clause right against federal disestablishment makes it quite awkward to mechanically 'incorporate' the clause against the states via the Fourteenth Amendment.").

94. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1811 (2004). Schragger noted that constitutional theorists have rarely treated "locational fact[s] as significant" in Religion Clause cases and contended that "the predominantly local character of Religion Clause disputes should have theoretical and doctrinal significance." *Id.* at 1813; *cf.* Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19 (2006); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147 (2005) (arguing for localist approach to Equal Protection Clause); Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1624, 1627-28 (2006) (contending Takings Clause could apply differently to local governments than to state governments and national government).

95. *Cf., e.g.*, Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 440 (2006) (arguing that "[i]n terms of the First Amendment, 'place' is dramatically undertheorized").

96. *See generally* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 1 (2000). Michael McConnell has noted that:

"religion," but also on the institutional context—the place, physical or "metaphysical"[97]—of the religiously motivated conduct? On the Establishment Clause side, the signature questions include whether a particular public display of a religious symbol,[98] or a particular disbursement of public funds for the amelioration of a social problem,[99] is an unconstitutional endorsement or establishment of religion. Should the resolution of these questions depend, at all, on the particular institutional space or context in which the symbol is displayed or the funds are spent?[100]

Probably the most obvious way in which constitutional law might take on board a more institution-sensitive understanding of the Religion Clauses would be to focus more closely on the religious freedom of religious institutions, associations, groups and communities.[101] It is not new to observe that American judicial decisions and public conversations about religious freedom tend to focus on matters of individuals' rights, beliefs, consciences and practices.[102] The special place, role and freedoms of groups, associations and institutions are often overlooked.[103] To be sure, it is quite clear that such entities have First Amendment rights, if only in the sense that they are capable of being plaintiffs in free-exercise and non-

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> From the earliest days of the Republic, Americans have been debating whether the principle of free exercise entitles religious institutions or religiously motivated individuals to exemptions from generally applicable laws, or to other accommodations in order to alleviate the occasional conflict between the demands of faith and the demands of the state.

Id.

97. *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995) (noting that "forum" at issue was "forum more in a metaphysical than in a spatial or geographic sense . . . .").

98. *See generally* McCreary County v. ACLU of Ky., 545 U.S. 844 (2005); County of Allegheny v. ACLU, 492 U.S. 573 (1989).

99. *See generally* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Bowen v. Kendrick, 487 U.S. 589 (1988).

100. *See, e.g., County of Allegheny*, 492 U.S. at 599 (noting that crèche display at issue "sits on the Grand Staircase, the 'main' and 'most beautiful part' of the building that is the seat of county government").

101. I have discussed this matter in more detail in some of my other works. *See, e.g.*, Richard W. Garnett, *Church, State, and the Practice of Love*, 52 VILL. L. REV. 281 (2007); Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515 (2007); Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2007).

102. *See generally, e.g.*, Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 BYU L. REV. 1633 (2004).

103. *See, e.g.*, Angela C. Carmella, *Mary Ann Glendon on Religious Liberty: The Social Nature of the Person and the Public Nature of Religion*, 73 NOTRE DAME L. REV. 1191, 1196 (1998) (noting that, for Glendon, "privatization of the function of religious communities . . . perpetuates a legal concept of privatized religion that fails to describe and protect the widespread reality of public religion."); Gerard V. Bradley, *Forum Juridicum: Church Autonomy in the Constitutional Order*, 49 LA. L. REV. 1057, 1064 (1987) (noting that the idea of "church autonomy" sits uneasily in our law and discourse about religious freedom, because of our "longstanding blind spot . . . concerning groups of all kinds").

establishment lawsuits.[104] In *Mary Elizabeth Blue Hull Memorial Presbyterian Church*,[105] for example, the Justices held that Georgia's civil courts lacked the power to "determine ecclesiastical questions"—such as the question whether the Presbyterian Church in the United States had abandoned its "original tenets and doctrines"—and invoked, in support of this conclusion, the "spirit of freedom for religious organizations" that animates the First Amendment.[106] And, in *Amos*[107]—a case involving an exemption from Title VII's ban on religious discrimination—Justice Brennan emphasized, in his concurring opinion, the "rights of religious organizations" and these organizations' "interest in autonomy in ordering their internal affairs."[108] Religious institutions, he insisted, are "organic entit[ies]" and are "not reducible to a mere aggregation of individuals."[109]

It would be possible to go on and on, deepening and shoring up the point that religious institutions, like religious believers, do and should enjoy free-exercise rights as well as a measure of autonomy and independence, rooted in both the free-exercise and non-establishment requirements. Many of the very best church-state scholars have explored in careful detail the content and contours of these institutions' rights as well as the theoretical and normative bases for their freedoms and immunities.[110] On the other hand, as I have noted elsewhere, there is reason for concern about the contemporary vulnerability of religious institutions' freedom and autonomy with respect to matters of internal polity. "[T]he preservation," I have suggested, "of the churches' moral and legal right to

104. *See, e.g.*, Serbian E. Orthodox Diocese for the U.S. and Can. v. Milivojevich, 426 U.S. 696 (1976); Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church in N. Am., 343 U.S. 972 (1952).

105. Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969). For a more detailed discussion of this case, see Richard W. Garnett, *Assimilation, Toleration, and the State's Interest in the Development of Religious Doctrine*, 51 UCLA L. REV. 1645 (2004).

106. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. at 445-46, 443, 448 (noting preference for excluding religious questions from courts); *see also, e.g.*, Watson v. Jones, 80 U.S. 679, 729 (1871) ("It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance[.]").

107. Corp. of the Presiding Bishop of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

108. *Id.* at 340, 341 (Brennan, J., concurring).

109. *Id.* at 342 (citing, *inter alia*, Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983)).

110. *See, e.g.*, JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 139-54 (1996); Bradley, *Forum Juridicum*, *supra* note 103; Brady, *supra* note 102; Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998); Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99; Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of* Employment Discrimination, 67 B.U. L. REV. 391 (1987); Lupu & Tuttle, *Religious Entities*, *supra* note 5.

govern themselves in accord with their own norms and in response to their own calling is our day's most pressing religious freedom challenge."[111] An appreciation for the rights and independence of religious institutions, and an account of the implications of these rights for the financial, regulatory, cooperative and other relations between religious and governmental institutions, is a crucial component of any attractive account of the Religion Clauses.

All that said, a focus on what Professor Balkin calls the "infrastructure" of religious freedom,[112] and on the place of religious institutions in that infrastructure, might pull the discussion away from these "institutional" questions, and push it in a slightly different and perhaps less explored direction. Yes, an appropriately institutional approach to the Religion Clauses would involve attention to the religious-freedom rights of religious entities, and to the significance for free-exercise and non-establishment cases of institutional context or the institutional character of the relevant state actors. However, one taking such an approach might also want to ask whether religious institutions—healthy, independent, free, diverse institutions—are not also among the necessary conditions *for* everyone else's religious freedom. If it is true that, say, newspapers and universities not only exercise the freedom of expression but also make its full exercise and flourishing possible for others,[113] by helping to generate that which freedom's exercise and flourishing require, then perhaps it is also true that churches and parochial schools do likewise.

V.

The title of this Essay is "*towards* an institutional understanding of the Religion Clauses," and perhaps this title provides some cover for not purporting to complete the journey to such an understanding. Here is the basic shape of the discussion so far: Institutions matter, in a special way, to the First Amendment and to the enterprise of enforcing and interpreting it. Some institutions, we might think, are "First Amendment" institutions—universities, political parties, expressive associations, newspapers, etc. To say this is certainly not to say that other speakers or institutions are unprotected or unworthy. It is to say, instead, that our free-speech doctrines and categories might do a better job of what we want them to do—capturing, translating, filtering—if they take institutions, and particularly these institutions, into account. Religious institutions, too, should similarly be regarded as "First Amendment" institutions, institutions that are

111. Garnett, *Pluralism, Dialogue, and Freedom*, *supra* note 60, at 521. For a very different view see Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-up*, 29 CARDOZO L. REV. 225 (2007) (critiquing church autonomy theory).

112. *See* Balkin, Infrastructure, *supra* note 3 (defending existence of infrastructure of religious freedom).

113. *See, e.g.*, Horwitz, *Universities*, *supra* note 1, at 1497 (urging importance "First Amendment institutions" in First Amendment doctrine).

not reducible to the rights and interests of their members and employees. If newspapers and universities matter, in a special way, for the meaning and values of the Free Speech Clause, and if we suspect that it makes sense for free-speech doctrine and categories to not be blind to the contours of these institutions, then perhaps the same thing is true with respect to the Religion Clauses.

The history of these provisions is famously contested. Their aims are multiple.[114] Some seem clear, others seem obscure. It is far from obvious what the Religion Clauses were understood to do, in terms of constraining the national government, let alone the states, and it is not clear what it should mean for us today. Even those of us who are sympathetic to the view that constitutional provisions should be understood and applied, to the extent possible, in accord with their original public meaning have to admit that the Religion Clauses serve as vehicles for the construction and implementation of one or another political theories about the nature and value of religious freedom and the appropriate relations between religious and political authority and institutions.

Even so, the implementation, application, interpretation and enforcement of these Clauses are going to involve the development and deployment of categories, doctrines and abstractions. And, the claims developed in the context of the Free Speech Clause, with respect to the need for institution-sensitive doctrine, apply in the Religion Clauses context as well. Indeed, it could be that the Supreme Court's Religion Clauses doctrine is famously confused and confusing, not because religion is inherently "divisive," not because scholars disagree about the content and relevance of the First Amendment's original meaning, and not because that doctrine is the product of changing groups of judges, appointed by Presidents of different parties, with a range of values and commitments. Instead, it could be that our constitutional doctrine and our thinking about religious freedom under law do not reflect, capture and translate very well the importance of particular institutions in the constitutional order and to the values that the First Amendment should serve.[115]

This Essay's "institutional," or "infrastructural," proposal is that the values and goods that the First Amendment's Religion Clauses are today understood to embody and protect—and, we might usefully refer to this cluster of goods and values as "religious freedom"—are well served by a civil-society landscape that is thick with churches (and other religious institutions and associations), and by legal rules that acknowledge and capture their importance. These institutions contribute to—they do not only ben-

114. *See generally* JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (2d ed. 2005).

115. My colleague, Paolo Carozza, observed to me that this feature of our religious-freedom doctrines might reflect, or resemble, more generally, a weakness of rights-based approaches to questions of freedom and the common good. *See generally, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF MORAL DISCOURSE (1991).

efit from, and they are not only protected by—the reality of religious freedom under law. Just as the "[f]reedom of speech . . . depends on an infrastructure of free expression,"[116] the freedom of religion depends on an infrastructure of, well, religious freedom. Part of this infrastructure—in addition to its more obvious components, like open and functioning courts, legal accommodations, thriving communications networks, etc.—is a web of independent, thriving, distinctive institutions.

How, exactly, do churches (and the like) shore up (and not just find shelter within) the freedom of religion? It is clearly not by supplanting the freedom of the individual religious conscience as the ultimate beneficiary of religious freedom under law. Quite the contrary. As I have spelled out in more detail elsewhere,[117] the existence and independence of religious institutions—and specifically, of the Church—long served, and is still needed today, as the "social armature to the sacred order," within which the individual human person could be "secure in all the freedoms that his sacredness demands."[118]

Obviously, the days are long gone when we could speak of *the* Church as the chief rival to, check upon and sometimes close partner with *the* State. Today, in our religious-freedom doctrines and conversations, it is likely that the independence and autonomy of churches, and of religious institutions and associations generally are seen as deriving from the free-exercise or conscience rights of individual persons rather than as providing the basis for the exercise of those rights. (Indeed, many would say, and perhaps celebrate the fact, that institutions are becoming less important to our religious, or "spiritual," lives.[119]) It remains the case, though, that the existence and independence of religious institutions—self-defining, self-governing, self-directing institutions—are needed, as John Courtney Murray put it, to "check the encroachments of secular power and preserve [the] immunities" of our "basic human things."[120] Murray was right to worry that the individual conscience, standing alone, is not up to the task of creating and sustaining the conditions necessary to ensure religious freedom; it is not, as he put it, "equal to the burden" of serving as the "sole authentic mediator of moral imperatives to the political order" and the "keystone of the modern experiment in freedom."[121] An institutional approach to the Religion Clauses would recognize this worry, and have responding to it as its chief aim.

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116. Balkin, Two Ideas for Access to Knowledge, *supra* note 2.

117. *See, e.g.*, Garnett, *The Freedom of the Church*, *supra* note 101 (discussing interaction between individual conscience and freedom of religion).

118. JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 204, 205 (1988).

119. *See, e.g.*, ALAN WOLFE, THE TRANSFORMATION OF AMERICAN RELIGION: HOW WE ACTUALLY LIVE OUR FAITH (2003); *see also*, Garnett, *Assimilation*, *supra* note 105, 1662-65 (discussing Wolfe's claims regarding developments in Americans' religious views).

120. MURRAY, *supra* note 118, at 204.

121. *Id.* at 213.